OCT 10 1949
CHARLES ELMORE CROP
CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO. 383

GILSON BROTHERS, a Corporation,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Wisconsin
and
BRIEF IN SUPPORT THEREOF

CLARK M. ROBERTSON,
324 East Wisconsin Avenue,
Milwaukee 2, Wisconsin,
Counsel.

O. S. HOEBRECKX,
633 North Water Street,
Milwaukee 2, Wisconsin.

HOWARD R. JOHNSON,
324 East Wisconsin Avenue,
Milwaukee 2, Wisconsin,
Of Counsel.

HAMMERSMITH-KORTMEYER CO., MILWAUKEE

INDEX

Page

PETITION FOR WRIT OF CERTIORARI..... 1

Statement of the Matter Involved..... 2

Jurisdiction 6

Questions Presented 8

Prayer for Writ 9

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 10

Appendix A 21

SYNOPSIS OF ARGUMENT

Federal Legislation Regulating Interstate Commerce Supersedes the Power of the State to Regulate Identical Activities in Interstate Commerce.... 10

Petitioner's Activities Affect Commerce Within the Purview of the National Labor Relations Act as Amended 11

The Activities Here Sought to be Regulated by the State Are Subject to Regulation by the National Labor Relations Board 12

The Power of the National Labor Relations Board to Prevent the Unfair Labor Practices in Section 8 is Exclusive 14

The State Board Cannot Acquire Jurisdiction by Refusing to Receive Evidence of Petitioner's Interstate Commerce Activities 19

Page

AUTHORITIES

Cases Cited

Algoma Plywood & Veneer Co. v. WERB, 336 US 301, 69 S. Ct. 584 ..... 8, 9, 17, 18

Bethlehem Steel Co. v. N.Y. Labor Relations Board, 330 US 767 ..... 8, 15, 16, 18

City of Gainesville v. Brown-Crummer Inv. Co., 277 US 54 20

International Union, UAW-AFL v. WERB, 336 US 245, 69 S. Ct. 516 ..... 8, 9, 17

LaCrosse Telephone Corp. v. WERB, 336 US 18, 69 S. Ct. 379 ..... 8, 15, 16, 19

LaCrosse Telephone Corp. v. WERB, 251 Wis. 583 15

Matson Nav. Co. v. US, 284 US 352 20

NLRB v. Fainblatt, 306 US 601 12

NLRB v. Jones & Laughlin Steel Corp., 301 US 1 12

North Pacific SS Co. v. Soley, 257 US 216 21

Panhandle Eastern Pipeline Co. v. Federal Power Comm., 324 US 365 20

Wisconsin Statutes Cited

Section 111.04 ..... 6, 12, 21

Section 111.06(1)(a) 6, 12, 21

Section 111.06(1)(c) 6, 12, 21

Section 111.07(4) 6, 22

Section 111.07(7) 6, 22

Page

Federal Statutes Cited

National Labor Relations Act, 49 Stats. 449, as Amended 2, 6
Section 2(6) 11
Section 2(7) 11
Section 7 13
Section 8(a)(1) 14
Section 8(a)(3) 14
Section 10(a) 13, 14
Judicial Code, Title 28, USCA, Sec. 1257 6

United States Constitution

Article I, Section 8 ..... 6, 10
Article VI 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO.....

GILSON BROTHERS, a Corporation,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO the Justices of the Supreme Court of the United States:

Gilson Brothers, a Corporation, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the decision of the Supreme Court of Wisconsin, rendered on July 12, 1949, confirming the judgment of the Circuit Court of Ozaukee County, Wisconsin, enforcing an order of the Wisconsin Employment Relations Board, dated September 28, 1948.

The opinion of the Supreme Court of Wisconsin (R. 138-142) is reported in 255 Wis. 316, 38 N.W. (2d) 492. The judgment of the Circuit Court for Ozaukee County, Wisconsin, appears on pages 129-133 of the

printed record. The Findings of Fact, Conclusions of Law, and Order of the Wisconsin Employment Relations Board appear at pages 107-114 of the printed record.

STATEMENT OF THE MATTER INVOLVED

This case involves the question of the power of the Wisconsin Employment Relations Board to regulate activities subject to control by the National Labor Relations Board under the National Labor Relations Act, 49 Stats. 449, as amended.

Gilson Brothers, your Petitioner, hereinafter referred to as the "Company," is a Wisconsin corporation with its plant and principal place of business located in the City of Fredonia, Wisconsin. The Company is engaged in the manufacture and sale of various types of road machinery (R. 108[1]). The Company, in the year 1948, produced and sold products valued in excess of five hundred thousand dollars ($500,000), ninety per cent (90%) of which were shipped to points outside the State of Wisconsin; and during the same period, purchased raw materials, equipment, and other supplies valued in excess of three hundred fifty thousand dollars ($350,000), forty per cent (40%) of which were shipped to Fredonia, Wisconsin, from outside the State of Wisconsin. (R. 120).

On July 21, 1948, the Company discharged Donald Schoedel; and on July 24, 1948, it discharged Arthur

[1] Record references are to the record as printed for the use of the Supreme Court of Wisconsin, to which has been added that Court's opinion and the record certificate of the Clerk of the Supreme Court of Wisconsin, as permitted by Rule 38. References to the complete record are indicated on the left hand side of the record printed for the court below.

Himes and Theophilus Ottenbacher. The United Automobile Workers of America, AFL, Region #9, hereinafter referred to as the "Union," thereafter filed two complaints with the Wisconsin Employment Relations Board, which alleged that the aforementioned employees were discharged "for the sole reason that such employee had been engaging in rights assured to him under the Wisconsin Statutes, and for the purpose of discouraging employees in the exercise of the right to join and become members of the" Union (R. 101-102). The Company filed an answer denying the allegations of the complaints.

The Wisconsin Employment Relations Board, hereinafter referred to as the "State Board," conducted a hearing in Milwaukee, Wisconsin, on August 10, 1948, and issued its Findings of Fact, Conclusions of Law, and Order on September 28, 1948 (R. 107-114).

The State Board found as a fact:

> "That all of such discharges were without cause, were solely for the reason that Schoedel, Himes, and Ottenbacher had engaged in attempting to organize the employees of the Respondent to induce such employees to engage in lawful, concerted activities for their mutual aid and protection, and to become members of the complainant labor organization." (R. 109)

The State Board concluded as a matter of law:

> "That by the discharge of Donald Schoedel, Arthur Himes, and Theophilus Ottenbacher, the Respondent, Gilson Brothers, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) and (1)(c) of the Wisconsin Statutes, by interfering with, restraining, and coercing its employees in their right to join in lawful, concerted activities, and by discourag-

ing, or attempting to discourage membership in the complainant organization by discrimination in the tenure of employment of said Schoedel, Himes, and Ottenbacher." (R. 109-110)

The State Board ordered the Company to:

> "* * * cease and desist from (a) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in lawful, concerted activities (b) Discouraging membership in the complainant labor organization, or in any labor organization, by discrimination in regard to the tenure of employment because any of its employees exercise the right guaranteed them by the Statutes." (R. 110)

The State Board also ordered the Company to reinstate the employees with back pay, and to post a notice in the plant advising the employees of this action, and stating further that:

> "All of our employees are free to join or to assist labor organizations of their choice or to refrain from such activity. All of them are free to become and remain members of any organization, or refrain from any organizational activity. We will not discriminate in regard to the hire or tenure of employment or any terms or conditions of employment against any employee because of membership in or activities on behalf of any labor organization, or because of failure to maintain membership in any labor organization." (R. 113-114)

Upon receipt of the Order of the State Board, the Company petitioned the Board for leave to adduce additional evidence (R. 114-115). At the hearing on the petition, the Company stated that, among other things, it desired to introduce testimony through the Company's president "to show that this Company is engaged in interstate commerce." (R. 115) Upon the Company's offer to introduce

testimony relating to the Company's interstate commerce activities, the Chairman of the State Board who presided at the hearing stated:

> "If the motion was granted, we would certainly not allow that testimony be offered at this time, because there is no excuse for that." (R. 116)

Thereafter, the State Board denied the Company's request for leave to adduce additional evidence (R. 116-117).

On December 30, 1948, the Company was served with a notice of a hearing on a Petition for Enforcement, filed by the State Board in the Circuit Court of Ozaukee County, Wisconsin (R. 117). Thereafter, on January 26, 1949, the Company obtained an order from the Circuit Court of Ozaukee County, Wisconsin, requiring the State Board and the Union to show cause why the Petition for Enforcement should not be dismissed for lack of jurisdiction, and in the alternative, why the Company should not be granted leave to adduce additional evidence relating inter alia to the interstate nature of the Company's business (R. 117-119). Attached to the motion was an affidavit executed by the president of the Company showing that the Company was engaged in interstate commerce (R. 120). The Order to Show Cause and the Petition for Enforcement were argued in the Circuit Court in West Bend, Wisconsin on February 5, 1949 (R. 122).

The Circuit Court denied the Company's Motion to Dismiss and denied its request for leave to adduce additional testimony, and confirmed and enforced the order of the State Board (R. 123-129). The judgment of the Circuit Court was entered against the Company on March 11, 1949 (R. 129-133).

The Company appealed from that judgment; and on July 12, 1949, the Supreme Court of Wisconsin affirmed

the judgment of the Circuit Court of Ozaukee County, Wisconsin, enforcing the order of the State Board (R. 138-142).

JURISDICTION

This case is one over which this Court has jurisdiction under the provisions of the Judicial Code, Title 28, USCA, Section 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In this case, the validity of the Statutes of the State of Wisconsin, to-wit: Sections 111.04, 111.06(1)(a) and (1)(c), 111.07(4) and (7), Wisconsin Statutes 1945, and a direction to enter judgment enforcing an order based on such statutes is drawn into question on the ground that such statutes, order and judgment, as construed in the opinion and judgment of the Supreme Court of Wisconsin, are repugnant to Article I, Section 8, and Article VI of the U. S. Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the National Labor Relations Act, 49 Stats. 449, as amended. The result reached by the Supreme Court of Wisconsin also

constituted a denial of due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States. The Supreme Court of Wisconsin is the last resort of all causes in the State of Wisconsin.

The Petitioner raised the jurisdictional question before the Wisconsin Employment Relations Board (R. 115-116), the Circuit Court of Ozaukee County (R. 123-129) and before the Supreme Court of Wisconsin (R. 138-142). The Supreme Court of Wisconsin held that neither the statutes nor the order based thereon conflicted in any way with the rights conferred or duties imposed by superior federal legislation; namely, the National Labor Relations Act—and held that the Wisconsin Employment Relations Board did have jurisdiction to entertain the proceedings before it and to issue the orders which it made.

Thus, the Supreme Court of Wisconsin has taken the position that the State of Wisconsin may validly regulate activities subject to control by the National Labor Relations Board, and that the exercise of such power does not infringe upon the power of the Congress to regulate interstate commerce as manifested in the National Labor Relations Act.

A copy of the entire record in this case, as certified to be true and correct by the Clerk of the Supreme Court of Wisconsin, is hereby furnished and made a part of this application in compliance with Rule 38, Paragraph 1, of the Rules of this Court.

The State Statutes involved are set forth in Appendix A appearing at pages ~~22-24~~ 21-23.

QUESTIONS PRESENTED

The following important and substantial Constitutional questions are presented here:

(1) Does the Wisconsin Employment Relations Board and the Courts of the State of Wisconsin have jurisdiction over activities subject to regulation by the National Labor Relations Board?

(2) Can the Wisconsin Employment Relations Board acquire jurisdiction over activities subject to regulation by the National Labor Relations Board, by refusing to accept, subsequent to the original hearing, evidence which would oust the State Board from jurisdiction?

REASONS FOR GRANTING THE WRIT

The questions involved are substantial. The decision and judgment of the Supreme Court of Wisconsin are in conflict with the decisions of this Honorable Court in the following cases:

Bethlehem Steel Co. v. N.Y. Labor Relations Board, 330 U.S. 767

LaCrosse Telephone Corp. v. WERB, 336 U.S. 18, 69 S. Ct. 379

International Union, UAW-AFL v. WERB, 336 U.S. 245, 69 S. Ct. 516

Algoma Plywood & Veneer Co. v. WERB, 336 U.S. 301, 69 S. Ct. 584

The decision and judgment of the Supreme Court of Wisconsin create uncertainties as to the rights, duties, and obligations of employers and employees subject to regulation by the National Labor Relations Board. This case presents to this Court the question as to whether the State

of Wisconsin has the power to control activities subject to control by the federal government under the National Labor Relations Act. The labor practices which the State Board seeks to forbid are identical with labor practices which the Congress has empowered the National Labor Relations Board to forbid.

This case involves no reservation of power to the state for the control and regulation of compulsory union membership contracts, as was involved in the *Algoma Plywood & Veneer Company* case, *supra,* or state control over a type of activity not regulated by the federal statutes, as was involved in the *International Union* case, *supra.* This case involves employer-employee activities admittedly subject to control by the National Labor Relations Board.

PRAYER FOR WRIT

Wherefore, your Petitioner prays that a Writ of Certiorari be issued by this Honorable Court and that the judgment of the Supreme Court of Wisconsin may be reviewed.

Respectfully submitted,

CLARK M. ROBERTSON,
Counsel for Petitioner.

O. S. HOEBRECKX
HOWARD R. JOHNSON
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO.....

GILSON BROTHERS, a Corporation,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Supreme Court of Wisconsin erred in affirming the judgment of the Circuit Court of Ozaukee County, Wisconsin, which judgment affirmed and enforced the order of the Wisconsin Employment Relations Board.

ARGUMENT

Federal Legislation Regulating Interstate Commerce Supersedes the Power of the State to Regulate Identical Activities in Interstate Commerce.

Under Article I, Section 8, of the Constitution of the United States, the Congress is vested with power to regulate commerce with foreign nations and among the several states, and to make all laws necessary and proper for carrying into execution that power. Pursuant to this Constitutional authority, the Congress enacted the National Labor Relations Act, as amended, for the express purpose of eliminating obstructions to interstate com-

merce. Under Article VI, the National Labor Relations Act, as amended, is the supreme law of the land, and the judges in every state are bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Petitioner's Activities Affect Commerce Within the Purview of the National Labor Relations Act as Amended.

Section 2(6) of the Act includes within the meaning of the term "commerce," "trade, traffic, commerce, transportation, or communication among the Several States." Section 2(7) of the Act defines the term "affecting commerce" in the following language:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The State Board found that the Petitioner is a corporation, with its principal place of business in the City of Fredonia, Wisconsin, and is engaged in the manufacture and sale of various types of road machinery (R. 108). The affidavit submitted to the Circuit Court shows that Petitioner, in the year 1948, produced and sold products valued in excess of five hundred thousand dollars ($500,000), ninety per cent (90%) of which were shipped to points outside the State of Wisconsin (R. 120). During the same period, Petitioner purchased raw materials, equipment, and other supplies valued in excess of three hundred fifty thousand dollars ($350,000), forty per cent (40%) of which were shipped to Fredonia from outside the State of Wisconsin (R. 120). These facts conclusively establish that Petitioner was engaged in activities af-

fecting commerce within the purview of the National Labor Relations Act, as that term has been applied and interpreted by this Court. (*NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1; *NLRB v. Fainblatt*, 306 US 601)

The Activities Here Sought to be Regulated by the State Are Subject to Regulation by the National Labor Relations Board.

The complaint filed by the Union alleged violations of Sections 111.06(1)(a), 111.06(1)(c), and 111.04 of the Wisconsin Statutes (R. 101-102).[1] The State Board concluded as a matter of law that the Petitioner had violated these statutes (R. 109-110). The nature of Petitioner's alleged unlawful activities were described by the State Board as:

> "* * * interfering with, restraining, and coercing its employees in their right to join in lawful, concerted activities, and by discouraging or attempting to discourage membership in the complainant organization by discrimination in the tenure of employment of said Schoedel, Himes, and Ottenbacher." (R. 110)

Petitioner was ordered to cease and desist from:

> "(a) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in lawful, concerted activities.
>
> "(b) Discouraging membership in the complainant labor organization, or in any labor organization, by discrimination in regard to the tenure of employment because any of its employees exercise the right guaranteed them by the Statutes." (R. 110)

Petitioner was further ordered to post a notice stating in part:

> "All of our employees are free to join or to assist labor organizations of their choice, or to refrain

[1] These statutes are set out in full on pages 22-24 in the appendix attached hereto. 21-23

from such activity. All of them are free to become and remain members of any organization, or refrain from any organizational activity. We will not discriminate in regard to the hire or tenure of employment or any terms or conditions of employment against any employee because of membership in, or activities on behalf of, any labor organization, or because of failure to maintain membership in any labor organization." (R. 113)

Section 7 of the National Labor Relations Act, as amended, defines "rights of employees" in part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *"

Section 10(a) of the Act empowers the National Labor Relations Board to prevent the following unfair labor practices as listed in Section 8:

> "(a) It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7:"
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

A comparison of the foregoing provisions with the sections found by the State Board to have been violated shows conclusively that the State Board is attempting to regulate activities subject to regulation under the National Labor Relations Act. Paragraph 1(a) of the State

Board's cease and desist order seeks to prevent activities coming within the purview of Section 8(a)(1) of the National Labor Relations Act; and Paragraph (1)(b) of the same order seeks to prevent activities coming within the purview of Section 8(a)(3) of the National Labor Relations Act. It should be noted that neither the complainant union nor the State Board at any time contended that the National Labor Relations Board did not have jurisdiction over the activities here involved.

The Power of the National Labor Relations Board to Prevent the Unfair Labor Practices in Section 8 is Exclusive.

In Section 10(a) of the Act, Congress not only empowered the National Labor Relations Board to prevent the stated unfair labor practices, but clearly manifested an intention to exclude all interference with the policies and procedures as set forth in the Act. Section 10(a) of the federal act provides in part as follows:

> "This power (the power of the National Board to prevent unfair labor practices) shall not be affected by any other means of adjustment or *prevention* that has been or may be established by agreement, *law* or otherwise:" *(Italics and parenthetical insertion supplied)*

Moreover, Congress expressly altered a previous policy under the Wagner Act and limited the power of the National Board to cede jurisdiction only in certain specific instances. It should be noted that Petitioner here is a manufacturer in interstate commerce, and this is one of the instances where the National Board is not authorized to cede jurisdiction "except where predominantly local in character." (Sec. 10(a)). The record here contains no evidence that the National Board has ceded jurisdiction to the State Board over Petitioner's operations.

The Supreme Court of Wisconsin, in sustaining the power of the State Board to issue the order here involved, stated:

> "There is nothing in the record to indicate that the National Labor Relations Board had ever accepted or attempted to exercise jurisdiction in a matter affecting the company or its employees, or that any petition has ever been filed requesting it to *so* act. Under the law as established by prior decisions of this court, the Wisconsin Employment Relations Board had jurisdiction. (*Wisconsin Labor R. Board v. Fred Rueping L. Co.,* 228 Wis. 473, 279 N.W. 673. *Allen-Bradley Local 1111 v. Wisconsin E. R. Board,* 237 Wis. 164, 295 N.W. 791. *International B. of E. W. v. Wisconsin E. R. Board,* 245 Wis. 532, 15 N.W. (2d) 823. *International Union v. Wisconsin E. R. Board,* 250 Wis. 550, 27 N.W. (2d) 875, 28 N.W. (2d) 254. *Wisconsin E. R. Board v. Algoma P&V Co.,* 252 Wis. 549, 32 N.W. (2d) 417."

All of the cases cited in the preceding quotations were decided prior to the decision of this Court in the *LaCrosse Telephone Corp. v. WERB* case, 336 U.S. 18, 69 S. Ct. 379. The precise issue here raised by Petitioner was involved in that case. The Supreme Court of Wisconsin stated in its opinion in *LaCrosse Telephone Corp. v. WERB,* 251 Wis. 583, at page 592:

> "* * * although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here until the federal power is exercised or jurisdiction thereto is taken as to particular employees."

The Wisconsin Court, in the *LaCrosse Telephone Corp.* case, *supra,* found that this Court's decision in *Bethlehem Steel Co. v. N.Y. Labor Relations Board,* 330 U.S. 767, was distinguishable, because, in the *LaCrosse* case, as here, the procedure of the National Board had

not been invoked. This Court had stated in the *Bethlehem Steel* case, *supra*:

> "Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past." (P. 775)

> "The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general * * * We do not believe this leaves room for the operation of the state authority asserted." (P. 776)

This Court, upon review of the *LaCrosse* case, *supra,* did not agree with the distinction made by the Wisconsin Court as to the application of the *Bethlehem Steel* case. The concurrent jurisdiction theory, relied upon by the Wisconsin Court to sustain the State Board's jurisdiction, was specifically rejected by this Court in the *LaCrosse Telephone* case, *supra,* in the following language:

> "The Wisconsin Supreme Court concluded that the Wisconsin Board could exercise jurisdiction here until and unless the National Board undertook to determine the appropriate bargaining representative or unit of representation of these employees. This view was urged on us in the like cases coming here under a New York statute. In *Bethlehem Steel Co.*

v. State Board, supra, at 776, we rejected that argument saying:

> 'The State argued for a rule that would enable it to act until the Federal Board has acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here.'

"We went on to point out that the National Board had jurisdiction of the industry in which those particular employees were engaged and has asserted control of their labor relations in general. Both the state and federal statutes had laid hold of the same relationship and had provided different standards for its regulation. Since the employers in question were subject to regulation by the National Board, we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us."

"Those considerations control the present cases. This employer is concededly engaged in interstate commerce, and the industry is one over which the National Board has consistently exercised jurisdiction." (69 S. Ct. 379, P. 382)

The *International Union* and *Algoma Plywood* cases, referred to by the Wisconsin Court in its opinion, were also reviewed by this Court. In those cases, this Court sustained the jurisdiction of the State Board, but not on the theory of concurrent jurisdiction. In both cases, (*International Union, UAW-AFL v. WERB,* 336 U.S. 245, *Algoma Plywood & Veneer Co. v. WERB,* 336 U.S. 301) this Court again rejected the theory that the state had the power to act with respect to labor relations matters subject to regulation by the National Board until the National Board had taken jurisdiction. In the *International Union* case, *supra,* this Court reaffirmed the ex-

clusive jurisdiction of the National Board in the following language:

> It seems to us clear that this case falls within the rule announced in *Allen-Bradley* that the state may police these strike activities, as it could police the strike activities there, because *'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the Federal Board.' There is no existing or possible conflict or overlapping between the authority of the federal and state boards,* because the federal board has no authority either to investigate, approve, or forbid the union conduct in question. *This conduct is governable by the state, or it is entirely ungoverned."* (*Italics ours*) (69 S. Ct. 516. P. 521)

In the *Algoma* case, *supra,* this Court stated:

> "The States are free (*apart from preemption by Congress*) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law as an 'unfair labor practice.'" (69 S. Ct. 584, P. 587—*Italics ours*)

The exclusive jurisdiction of the National Board was expressly recognized by this Court in the following language:

> "Since the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices *over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal law,* such freedom of action by a State cannot be lost because the National Board has once held an election under the Wagner Act. The character of activities left to State regulation is not changed by the fact of certification." (*Italics ours*) (69 S. Ct. 584, P. 591)

The clear import of this Court's decisions, commencing with the *Bethlehem Steel* case, *supra,* is that the National

Labor Relations Board has exclusive jurisdiction to prevent the unfair labor practices listed in Section 8 of the National Act. Control over labor relations which may be exercised by the states is limited to the area not preempted by the federal government.

The State Board Cannot Acquire Jurisdiction by Refusing to Receive Evidence of Petitioner's Interstate Commerce Activities.

At the time of the hearing in August of 1948, the concurrent jurisdiction doctrine was law in the State of Wisconsin. However, at the time the State Board issued its order on September 28, 1948, it was known generally that the validity of this doctrine was at issue in the *LaCrosse Telephone* case, *supra,* then pending before this Court. The Petitioner sought immediately to reopen the record for the purpose of introducing evidence showing the details of Petitioner's interstate commerce activities. This Court's decision in the *LaCrosse* case, *supra,* was handed down on January 19, 1949; and Petitioner, on January 26, 1949, again renewed its request for leave to adduce such evidence before the Circuit Court. The opinions of both the Circuit Court and the Supreme Court of Wisconsin clearly indicate that the introduction of such evidence would not have altered their decisions as to jurisdiction. Both Courts justified the exclusion of this evidence on the ground that the application to adduce the evidence was not timely.

In this determination, it is submitted that the State Board, the Circuit Court for Ozaukee County, and the Supreme Court of Wisconsin erred. The law with respect to the obligation of the State Board to receive the evidence as to jurisdiction is well settled and is carefully stated in 14 Am. Jur., Section 191, which reads as follows:

"Where judicial tribunals have no jurisdiction of the subject matter, on which they assume to act, their proceedings are absolutely void in the strictest sense of the term; and a court which is competent to decide on its own jurisdiction in a given case may determine that question at any time in the proceedings of the cause, whenever that fact is made to appear to its satisfaction, either before or after judgment. Accordingly, an objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceedings; in fact, it may be raised for the first time on appeal. A court will recognize want of jurisdiction over the subject matter even if no objection is made. Therefore, whenever a want of jurisdiction is suggested, by the court's examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction, it is powerless to act in the case.

"A plaintiff against whom judgment went in the lower court may on appeal raise the question of the jurisdiction of the trial court and have the judgment reversed if the court did not have jurisdiction of the subject matter, although the assumption of jurisdiction was to his advantage.

"As heretofore shown, the jurisdiction of a court over the subject matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a court, as such, by the consent of the parties. It naturally follows that if jurisdiction cannot be conferred by consent, the want thereof cannot be waived by any act of the parties."

The following decisions of this Court are cited in support of the above quotation:

Panhandle Eastern Pipeline Co. v. Federal Power Comm., 324 US 365

Matson Nav. Co. v. US, 284 US 352

City of Gainesville v. Brown-Crummer Inv. Co., 277 US 54

North Pacific SS Co. v. Soley, 257 US 216

The action of the Wisconsin State Board and the Wisconsin courts in depriving Petitioner of the right to adduce the evidence as to jurisdiction constitutes a denial of due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

CLARK M. ROBERTSON,
Counsel.

O. S. HOEBRECKX
HOWARD R. JOHNSON
Of Counsel.

APPENDIX A

Wisconsin Statutes, 1945

Sec. 111.04

"Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Sec. 111.06(1)(a)

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain, or coerce his employees in the exercise of the rights guaranteed in Section 111.04."

Sec. 111.06(1)(c)

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(c) 1. To encourage or discourage membership in any labor organization, employee agency, committee, as-

sociation or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; * * *"

Sec. 111.07(4)

"(4) After the final hearing the Board shall promptly make and file its findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties. Pending the final determination by it of any controversy before it the Board may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the Board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order."

Sec. 111.07(7)

"(7) If any person fails or neglects to obey an order of the Board while the same is in effect the Board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the Board. Upon such filing the Board shall cause notice thereof to be served upon such person by mailing a copy to his last known post office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing before said

court upon such record by the Board serving ten days written notice upon the respondent; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the Board and enter an appropriate decree. No objection that has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive. The court may, in its discretion, grant leave to adduce additional evidence where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the Board. The Board may modify its findings as to the facts, or make new findings by reason of such additional evidence, and it shall file such modified or new findings with the same effect as its original findings and shall file its recommendations, if any, for the modification or setting aside of its original order. The court's judgment and decree shall be final except that the same shall be subject to review by the Supreme Court in the same manner as provided in Section 102.25."

INDEX AND SYNOPSIS OF ARGUMENT

PAGE

FACTS 1

JURISDICTION 5

QUESTIONS PRESENTED 6

SUMMARY OF ARGUMENT 7

I. The Wisconsin Supreme Court did not, and could not, decide a Federal Question, because it was limited to Review of the Record made before the State Board; and Such Record did not involve a Federal Question 7

II. Where the decision of a State Court is Based on a Non-federal Question, it is not Reviewable 14

III. No Federal Question can be Raised on the Basis of Facts not shown in the Record under review by the State Court 17

IV. Petitioner has Waived its Right to bring a Federal Question to this Court by its Conduct through which its Employees have lost their Opportunity to Pursue a Federal Remedy, if any Existed 18

CASES CITED

Alabama State Federation of Labor v. McAdory, (1945) 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed. 1725 8-9

Arkansas S. R. Co. v. German Nat. Bank, (Ark. 1907) 207 U. S. 270, 28 S. Ct. 78, 52 L. ed. 201 14-15

PAGE

Baine v. J. S. Murphy, Inc., (1947) 70 N. Y. S. 2d 295 11

Binderup v. Pathe Exchange, (1923) 263 U. S. 291, 44 S. Ct. 96, 68 L. ed. 308 12

Blakeley v. Fresno Oil Co., (Tex. 1948) 208 S. W. 2d 902 11

Brown, Bonnell and Co. v. Lake Superior Iron Co., (1890) 134 U. S. 530, 33 L. ed. 1021, 10 S. Ct. 604 8

Carter v. Carter Coal Co., (1936) 298 U. S. 238, 85 L. ed. 1160, 56 S. Ct. 855 9

Clark v. Pennsylvania, (1888) 128 U. S. 395, 9 S. Ct. 113, 32 L. ed. 487 17

Consolidated Turnp. Co. v. Norfolk & O. V. R. Co., (Va. 1913) 228 U. S. 596, 33 S. Ct. 605, 57 L. ed. 982 15

Crescent Cotton Oil Co. v. State of Mississippi, (1921) 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42 9

Damon v. Ford, Bacon & Davis, (D. C. Pa. 1945) 62 F. Supp. 446 11

Department of Treasury v. Ingram-Richardson Mfg. Co., (1941) 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866 9

Dred Scott v. Sandford, (1856) 60 U. S. 393, 19 Howard 393, 15 L. ed. 691 8

PAGE

Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., (Neb. 1917) 243 U. S. 157, 37 S. Ct. 318, 61 L. ed. 644 15-16

Greeley v. Lowe, (1894) 155 U. S. 58, 39 L. ed. 69, 15 S. Ct. 24 8

Grignon's Lessee v. Astor, (1844) 43 U. S. 319, 2 Howard 319, 11 L. ed. 283 11

Harland Oil Co. v. Pattison, (1944) 153 P. 2d 622, 194 Okl. 570 11

Heisler v. Thomas Colliery Co., (1922) 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83 9

Johnson v. Gr. Nat. Life Ins. Co., (Tex. Civ. App. 1942) 166 S. W. 2d 935 11

Kelly v. Ford, Bacon & Davis, (D. C. Pa. 1946) 71 F. Supp. 311 11

Kennedy v. Silas Mason Co., (D. C. La. 1946) 68 F. Supp. 576 11

Krill v. Arma Corporation, (D. C. N. Y. 1948) 76 F. Supp. 14 11

Maitrejean v. Metcalfe Construction Co., (C. C. A. Minn. 1948) 165 F. 2d 571 ..... 10, 11

National Labor Relations Bd. v. Jones & Laughlin S. Corp., (1937) 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 9

PAGE

Oliver Iron Mining Co. v. Lord, (1923) 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526 9

Parker v. Brown, (1943) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315 9

Reed v. Murphey, (C. C. A. Miss. 1948) 168 F. 2d. 257 10

Schecter Poultry Corporation v. United States, (1935) 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837 9

Schulte, Inc., D. A. v. Gangi, (1946) 328 U. S. 108, 66 S. Ct. 925, 90 L. ed. 1114 10

Snyder v. Dravis Corporation, (D. C. Pa. 1947) 6 F. R. D. 546 11

Southwestern Bell Tel. Co. v. Oklahoma, (1938) 303 U. S. 206, 58 S. Ct. 528, 82 L. ed. 751 14

Steinberg v. Steinberg, (1947) 249 Ala. 529, 32 So. 2d 209 11

Tinyes v. J. Rich Steers, Inc., (1947) 71 N. Y. S. 2d 684, 18 Misc. 106 11

Ullo v. Smith, (D. C. N. Y. 1945) 62 F. Supp. 757 11

United Mine Workers of America v. Coronado Coal Co., (1922) 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570 9

Warren-Bradshaw Drilling Co. v. Hall, (1942) 317 U. S. 88, 87 L. ed. 83, 63 S. Ct. 125 10

PAGE

Western Indemnity Co. v. Rupp, (1914) 235 U. S. 261, 35 S. Ct. 37, 59 L. ed. 220 ..... 12-13, 18

STATUTES INVOLVED

United States Statutes

28 U. S. C. A. sec. 1257 5

28 U. S. C. A. sec. 344, note 41 14

TEXT

2 Am. Jur. 969 18

IN THE

Supreme Court of the United States

October Term, 1949

No.....

GILSON BROTHERS, a Corporation,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

Brief of Respondent Wisconsin Employment Relations Board In Opposition To Certiorari

FACTS

The decision of the Wisconsin Supreme Court of which review is sought was not based upon a federal question. The decision relied primarily, if not solely, upon grounds unrelated to the federal issues sought to be raised here. In order to bring a federal question into the case, the petitioner asserts facts which were not established by evidence in the record. The state court was limited by local law to review of the proceedings before the Wisconsin Employment Relations Board. The board's findings were not chal-

lenged and none of the evidence has been brought up in the record. The petitioner should, therefore, be limited to the facts in the board's findings which were not challenged.

The State Supreme Court was unable to consider the federal question because the petitioner did not raise it during the hearing on the merits nor offer any evidence at that time which would support its contentions if the question had been raised.

In determining whether the jurisdiction of the Supreme Court of the United States is invoked, the pertinent facts shown in the record are:

The petitioner (hereinafter referred to as the employer) discharged three of its employees on July 21 and 24, 1948 (R. 109). The labor union to which they belonged filed charges of unfair practice with the Wisconsin Employment Relations Board on July 21 and 26, based on such discharges (R. 101-102). The employer raised no federal questions in its pleadings, but filed answers with the state board asserting defenses on the merits, under the state law (R. 103-104). The board held a hearing on August 10, 1948, and received all evidence the employer offered. The employer presented a complete defense upon the merits. It did not challenge the board's jurisdiction nor present any evidence to show that the matter was not within the jurisdiction of the state board.

Both the pleadings before the board and the evidence introduced at the hearing showed that the employer is a small Wisconsin corporation operating wholly within the state (R. 108). The jurisdiction of the National Labor Relations Board has never been invoked with respect to this employer or its employees (R. 141).

On September 28, 1948, the state board issued its order finding the employer to have committed an unfair practice under the state law. The order was immediately served upon the employer which, upon finding the decision adverse, petitioned the board on October 16, 1948 for an opportunity to present further evidence. The petition did not state the nature of the further evidence the employer desired to offer, nor did it make any reference to the federal question now sought to be raised (R. 114-115).

On October 25, 1948 the board conducted a further hearing to determine whether the proposed evidence was of a nature which its statutory authority would permit it to consider[1].

Upon ascertaining at the hearing that the employer did not seek to introduce newly discovered evidence, but only data which had been in its possession before the proceedings were commenced, the board denied the petition as it was bound to do under the statutory limitations upon its authority.

The employer did not take any steps to seek review of the order of the state board, as it is authorized to do under the Wisconsin Statutes;[2] but neither did it obey the order. The board accordingly petitioned the circuit court of the county in which the employer transacts its business for the enforcement of its order.

The board's petition for enforcement was served upon the employer on December 30, 1948, and was noticed for hearing on February 2, 1949. The employer filed no answer, pleading, nor motion until January 26, 1949. It then

---

[1]Under sec. 111.07 (6) of the Wis. Stats., the state board is authorized to modify an order after its issuance only "if it shall discover any mistake therein, or upon the grounds of newly discovered evidence."

[2]Sec. 111.07 (8) Wis. Stats.

served an order to show cause why the board's petition should not be dismissed on jurisdictional grounds, or why the board should not be directed to receive additional testimony. It is significant that service of this order was delayed until just two days after the period had expired, during which a charge of unfair practice might have been filed with the National Labor Relations Board.[3]

The circuit court of Ozaukee county heard arguments on February 5, 1949, and determined that the employer had not shown adequate grounds as required under the statute to permit reopening of the matter for further evidence.[4]

Upon appeal to the Supreme Court of Wisconsin the employer again sought to raise the issue that the state board had no jurisdiction because the matters involved were subject solely to the National Labor Relations Board.

The considerations of the Wisconsin Supreme Court, as well as those of the circuit court, are limited by statute to review of the record of the proceedings before the board.[5]

There was no evidence in the record made before the board on which the federal question could be decided. The petitioner sought to inject such evidence by affidavit filed with the circuit court. Such affidavit was no part of the record made before the board and it would not be evidence

---

[3]Section 10 (b) of the Labor-Management Relations Act, 1949, 28 U. S. C. A. Supp. Sec. 160 (b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the board."

[4]Sec. 111.07 (7), Wis. Stats., provides that the court may grant leave to introduce additional evidence only "where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the board."

[5]See sec. 111.07 (7), Wis. Stats., and **Century Building Co. v. Wisconsin E. R. Board,** (1940) 235 Wis. 376, 291 N. W. 305.

in any event, but rather in the nature of a self-serving statement.

The supreme court of the state, therefore, based its decision on the premises that the record may be made before the board supported its order, and that the employer had not met the statutory conditions precedent to having the matter reopened before the board for further hearing. The pertinent parts of the decision showing the basis of the state court's decision are set out below.*

JURISDICTION

The petitioner has invoked jurisdiction under Title 28 U. S. C. A. sec. 1257. It is the position of the respondent that this petition does not invoke the jurisdiction of the United States Supreme Court for two reasons.

(1) The decision of the Wisconsin supreme court was not based upon a federal question, and a determination of such question was not necessary to the disposition of the matter.

(2) The petitioner by its conduct has waived whatever right it might otherwise have had to review of such a question.

---

*"• • • In this case, the record shows that the company is a Wisconsin corporation, conducting its manufacturing operations in Wisconsin, with Wisconsin employees. There is nothing in the record to indicate that the National Labor Relations Board had ever accepted or attempted to exercise jurisdiction in a matter affecting the company or its employees, or that any petition has ever been filed requesting it to so act. • • •

"• • •

"• • • It [the petitioner] also sought to show through its president that it was engaged in selling most of its product in interstate commerce and that it bought a high percentage of its materials and supplies from out-of-state sources. This evidence was also available at the time of the hearing before the board, and no reasonable cause was shown for failure to introduce it at that time. From the record we find that the court did not abuse its discretion in holding as it did."

QUESTIONS PRESENTED

The questions set out at page 8 of the brief in support of petition for certiorari are the ones which it sought to raise after completion of trial on the merits, but which the state courts could not decide because the petitioner had failed to place them in the record in the manner required by statute.

The real issue is:

May an employer proceed through a complete hearing before a state agency on the merits of an unfair labor practice charge, without asserting or offering any evidence to indicate that its operations were subject to regulation by the National Labor Relations Board; and wait until after an adverse decision by the state agency to challenge state jurisdiction, when any right the employees might have had to apply for a remedy under the federal law expired during the proceedings?

ARGUMENT

I. The Wisconsin Supreme Court did not, and could not, decide a Federal Question, because it was limited to Review of the Record made before the State Board; and Such Record did not involve a Federal Question

Under the statutes of Wisconsin the functions of the court in a proceeding for enforcement of an order of the Wisconsin Employment Relations Board are limited to review of the record. If the board's findings are supported by the record they are conclusive.[7]

The court, as well as the state board and the parties to this proceeding, are governed by the statutory requirements with respect to introduction of the evidence in a proceeding before a state agency. It was on the ground that the employer did not meet the statutory requirements that the state board held it could not augment the record after decision on the merits, so as to present new issues. With respect to the evidence which the employer sought to introduce after decision on the merits, the state court said:

> "This evidence was also available at the time of the hearing before the board, and no reasonable cause for failure to introduce it was shown at that time."

Showing reasonable cause for failure to introduce evidence at the original hearing is a statutory condition precedent to obtaining permission to introduce it later.

If the entire subject matter, as shown by the record, were wholly outside the jurisdiction of the state board,

---

[7]Sec. 111.07 (7), Wis. Stats., **Century Building Company v. Wisconsin E. R. Board**, (1940) 235 Wis. 376, 291 N. W. 305; **Appleton Chair Corp. v. United Brotherhood**, (1941) 239 Wis. 337, 1 N. W. 2d 188.

a different question might be presented; but where a tribunal unquestionably has some jurisdiction over the subject matter and a party seeks to establish that the facts of a particular case do not fall within the general jurisdiction the issue must be raised as an affirmative defense. Such a case does not involve a *want* of jurisdiction of the subject matter, but rather the *limits* of jurisdiction.

This is a case such as was described in *Dred Scott v. Sandford,* (1856) 60 U. S. 393, 401, 19 Howard 393, 15 L. ed. 691, in which it was said that courts of states which have adopted common law rules:

> "* * * are presumed to have jurisdiction, unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court."

See also, *Greeley v. Lowe,* (1894) 155 U. S. 58, 39 L. ed. 69, 15 S. Ct. 24; *Brown, Bonnell and Co. v. Lake Superior Iron Co.,* (1890) 134 U. S. 530, 33 L. ed. 1021, 10 S. Ct. 604.

The situation is the same with respect to a state's jurisdiction over unfair labor practices. The state unquestionably has some jurisdiction in that field, albeit limited, as is recognized in this court in *Alabama State Federation of Labor v. McAdory,* (1945) 325 U. S. 450, 464, 65 S. Ct. 1384, 89 L. ed. 1725, in which it is said that:

> "The National Labor Relations Act does not extend to all industries and all employees. It is only applicable to those employments in which strikes and labor disputes would affect interstate commerce, and

are found to be such by the National Labor Relations Board."

Similarly in *National Labor Relations Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 32, 40, 57 S. Ct. 615, 81 L. ed. 893, the court said that the question is one of fact "to be decided as individual cases arise" whether a productive enterprise is of such a nature and extent that its labor disputes tend to obstruct commerce. Manufacturing, in itself, is not interstate commerce.

Parker v. Brown, (1943) 317 U. S. 341, 360, 63 S. Ct. 307, 87 L. ed. 315;

Department of Treasury v. Ingram-Richardson Mfg. Co., (1941) 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866;

Carter v. Carter Coal Co., (1936) 298 U. S. 238, 85 L. ed. 1160, 56 S. Ct. 855;

Schecter Poultry Corporation v. United States, (1935) 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837;

Oliver Iron Mining Co. v. Lord, (1923) 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526;

Heisler v. Thomas Colliery Co., (1922) 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83;

United Mine Workers of America v. Coronado Coal Co., (1922) 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570;

Crescent Cotton Oil Co. v. State of Mississippi, (1921) 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42.

Whether the operations of a particular manufacturing enterprise affect commerce so closely as to remove it from state control is a matter for affirmative proof in each case. See, for instance, *D. A. Schulte, Inc. v. Gangi,* (1946) 328 U. S. 108, 66 S. Ct. 925, 931, 90 L. ed. 1114, where it was said:

> "The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce must be met by evidence in the record. * * *"

In *Warren-Bradshaw Drilling Co. v. Hall,* (1942) 317 U. S. 88, 90, 87 L. ed. 83, 63 S. Ct. 125, it was said:

> "The application of the Act depends upon the character of the employees' activities. * * * The burden was therefore upon respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce. * * *"

In *Maitrejean v. Metcalfe Construction Co.,* (C. C. A. Minn. 1948) 165 F. 2d 571, 574, it was said:

> "It may well be that a timekeeper, a substantial portion of whose time is given to keeping the time of employees engaged in interstate commerce, is entitled to the protection of the Act, * * *. Even so, the burden is upon the employee to show that a substantial portion of his time was devoted to work within the protection of the Act * * *."

See, also:

Reed v. Murphey, (C. C. A. Miss. 1948) 168 F. 2d 257;

Maitrejean v. Metcalfe Construction Co., (C. C. A. Minn. 1948) 165 F. 2d 571;

Krill v. Arma Corporation, (D. C. N. Y. 1948) 76 F. Supp. 14;

Kelly v. Ford, Bacon & Davis, (D. C. Pa. 1946) 71 F. Supp. 311;

Snyder v. Dravis Corporation, (D. C. Pa. 1947) 6 F. R. D. 546;

Tinyes v. J. Rich Steers, Inc., (1947) 71 N. Y. S. 2d 684, 18 Misc. 106;

Baine v. J. S. Murphy, Inc., (1947) 70 N. Y. S. 2d 295;

Steinberg v. Steinberg, (1947) 249 Ala. 529, 32 So. 2d 209;

Blakeley v. Fresno Oil Co., (Tex. 1948) 208 S. W. 2d 902;

Kennedy v. Silas Mason Co., (D. C. La. 1946) 68 F. Supp. 576;

Ullo v. Smith, (D. C. N. Y. 1945) 62 F. Supp. 757;

Damon v. Ford, Bacon & Davis, (D. C. Pa. 1945) 62 F. Supp. 446;

Harland Oil Co. v. Pattison, (1944) 153 P. 2d 622, 194 Okl. 570;

Johnson v. Gr. Nat. Life Ins. Co., (Tex. Civ. App. 1942) 166 S. W. 2d 935.

This is not a case in which the state board was wholly wanting in jurisdiction of the subject matter. It is such a case as was referred to in *Grignon's Lessee v. Astor,* (1844) 43 U. S. 319, 2 Howard 319, 11 L. ed. 283, in which it was held that a court has jurisdiction if, on a demurrer, it could

enter judgment in the plaintiff's favor. Certainly under that principle the state board had jurisdiction on the basis of the pleadings and the evidence before it.

As stated in *Binderup v. Pathe Exchange*, (1923) 263 U. S. 291, 44 S. Ct. 96, 68 L. ed. 308, there is a total want of jurisdiction only when the claim set out in the complaint is plainly without color or merit.

The situation in the case before the court is governed by the principles of *Western Indemnity Co. v. Rupp*, (1914) 235 U. S. 261, 35 S. Ct. 37, 59 L. ed. 220, in which it was held that a state may prescribe rules, with which a litigant must comply in order to avail himself of the right to object to jurisdiction. If he desires to contest the validity of the proceeding he must do so subject to the rules prescribed. In 235 U. S. 273 it is stated:

> "The Fourteenth Amendment declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer v. Neff*, 95 U. S. 714, 732, 733; *York v. Texas*, 137 U. S. 15, 21. *But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the*

merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case, that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it. As appears from *Southern Pacific Co. v. Denton,* and other cases of the same class above cited, the distribution of original and appellate jurisdiction in the Federal courts is such as to sometimes give an advantage of this kind to defendants; but it is not indispensable to 'due process of law.' " (Emphasis supplied)

The same situation is involved in the instant case. The statutes of Wisconsin provide that a party participating in a proceeding upon the merits offer all the evidence on which he expects to rely, unless there is reason why he can not do so. The purpose of the statutes is substantially the same as the rule upheld in the foregoing case: to prevent one party from attempting to obtain a binding adjudication on the merits in his favor through the exercise of the state agency's jurisdiction, while depriving the other party of the possibility of protecting its rights by failing to disclose the defense upon which he expects to rely if defeated on the merits.

II. Where the decision of a State Court is based on a Non-federal Question, it is not Reviewable

The general rule is stated in *Southwestern Bell Tel. Co. v. Oklahoma,* (1938) 303 U. S. 206, 212-213, 58 S. Ct. 528, 82 L. ed. 751:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure v. Gaillard,* 127 U. S. 216, 234; *Johnson v. Risk,* 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co. v. Skinner,* 139 U. S. 293, 295, 297; *Whitney v. California,* 274 U. S. 357, 360, 361; *Lynch v. New York,* 293 U. S. 52, 54."

This rule has been so regularly followed that exhaustive citations would require more space than is practical here. Many cases are listed in 28 U. S. C. A. §344, note 41.

The rule has also been regularly followed that, if the decision of the highest court of a state rests primarily on a non-federal ground, the decision will not be reviewed even though the court also decided a federal question erroneously. See *Arkansas S. R. Co. v. German Nat. Bank,* (Ark. 1907) 207 U. S. 270, 275, 28 S. Ct. 78, 79, 52 L. ed. 201 in which it is said:

> "But according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was

necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. * * *"

Application of the rule was made in *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.*, (Va. 1913) 228 U. S. 596, 33 S. Ct. 605, 57 L. ed. 982 where the court said:

"* * * If it also appears that the judgment of the state court against the plaintiff in error was based upon a question of general law broad enough to support the decision, this court will not consider the Federal question, though it was considered and determined by the court below adversely to the plaintiff in error. * * *"

An application of the rule under circumstances similar in principle to the ones involved in this case was made in *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, (Neb. 1917) 243 U. S. 157, 37 S. Ct. 318, 61 L. ed. 644 in which the state court made a decision adverse to the plaintiff in error with respect to contentions based on the 14th amendment, but said that even if the other question had been decided differently the defendant in error was entitled to prevail on the ground that his adversaries were estopped by their own conduct. The court there said:

"Concisely stated, the assignments of error complain that the Supreme Court infringed the due pro-

cess and equal protection provisions of the Fourteenth Amendment, first, by giving decisive effect to the state board's decision, instead of holding that it was made without lawful notice or opportunity to be heard and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the State in disposing of other questions.

"Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel *in pais* was well grounded. The first was plainly a federal question and the other as plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it."

III. No Federal Question can be Raised on the Basis of Facts not shown in the Record under review by the State Court

The Supreme Court of Wisconsin was limited under the statutes and judicial policies of this state to reviewing the record in the proceedings before the Wisconsin Employment Relations Board. That record did not show facts upon which a federal question could be based. The situation is similar to that in *Clark v. Pennsylvania,* (1888) 128 U. S. 395, 9 S. Ct. 113, 32 L. ed. 487, in which review was sought on the contention that rights under the United States Constitution were violated by refusal to give certain instructions to the jury. The court held that, in the absence of anything in the record to show that the requested instructions were based upon evidence, there could be no review of the federal question. Without such evidence in the record, the court could not decide whether the refusal to give the requested instructions amounted to a ruling upon, and denial of, the federal rights asserted.

The decision of the court below was limited to review of a record containing neither a submission of a federal question nor evidence upon which it could be based. Under such circumstances an adverse decision on a federal question is not shown. Such a showing is an absolute prerequisite to review under the code.

IV. Petitioner has Waived its Right to bring a Federal Question to this Court by its Conduct through which its Employees have lost their Opportunity to Pursue a Federal Remedy, if any Existed

The gist of a petitioner's claim is that the action against it should have been brought before the National Labor Relations Board instead of before the Wisconsin Employment Relations Board. If its contentions were sustained, the result would be to give its acts immunity from both state and federal law.

The petitioner participated throughout the entire proceedings before the state board upon the merits, and made no claim that it was in the wrong forum until after an adverse decision. Even after the state board denied the employer's petition to reopen the case for further evidence (which the board was bound to do because of its limited statutory authority), the employer took no steps to have the action reviewed as it might have done under the state statutes. After the board commenced action to enforce its order, the petitioner refrained from challenging its jurisdiction for approximately a month, until after the time had expired under which a complaint could have been filed with the National Board.

It is stated in 2 Am. Jur. 969 that a party's rights to review "may be waived * * * by his own acts or conduct."

In support of the rule, there is cited the case of *Western Indemnity Co. v. Rupp,* (1914) 235 U. S. 261, 59 L. ed. 220, 35 S. Ct. 37, in which it was held that one who proceeded to trial upon the merits without raising a jurisdictional question in the manner provided by state law could not obtain review by the U. S. Supreme Court of a federal

question arising in connection with the jurisdiction of the first tribunal.

Respectfully submitted,

THOMAS E. FAIRCHILD
Attorney General

STEWART G. HONECK
Deputy Attorney General

BEATRICE LAMPERT
Assistant Attorney General

Attorneys for Wisconsin Employment Relations Board.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	10
Appendix	11

CITATIONS

Cases:

Algoma Plywood Co. v. *Wisconsin Employment Relations Board*, 336 U. S. 301	8, 9
Bethlehem Steel Co. v. *New York Labor Relations Board*, 330 U. S. 767	7, 8
Clearfield Machine Co., Matter of, 78 N.L.R.B. 59	3
Jaeger Machine Co., Matter of The, 74 N.L.R.B. 476	3
LaCrosse Telephone Corp. v. *Wisconsin Employment Relations Board*, 336 U. S. 18	7, 8, 9
Littleford Brothers, Matter of, 49 N.L.R.B. 949	3
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601	9

Statutes:

National Labor Relations Act:

Sec. 7	9
Sec. 8	9

Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C., Supp. II, 141, *et seq.*):

Sec. 2	11
Sec. 7	11
Sec. 8	12
Sec. 10	7, 13
Sec. 101	11
Sec. 104	7, 14

State Statute:

Wisconsin Employment Peace Act:

Sec. 111	3, 4, 9

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 383

GILSON BROTHERS, A CORPORATION, PETITIONER

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin (R. 138-142) is reported at 255 Wis. 316, 38 N. W. (2d) 492. The judgment of the Circuit Court for Ozaukee County, Wisconsin, appears at pp. 129-133 of the printed record. The Findings of Fact, Conclusions of Law and Order of the Wisconsin Employment Relations Board appear at pp. 107-114 of the printed record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 of Title 28, U. S. C.

QUESTION PRESENTED

The question presented is whether, absent cession of its jurisdiction by the National Labor Relations Board to a state board, the state board may constitutionally exercise jurisdiction to decide cases involving unfair labor practices within the purview of the National Act, when such practices arise out of employment relations in an industry subject to the National Act and over which the National Board has consistently exercised jurisdiction.

STATUTES INVOLVED

The pertinent provisions of the Wisconsin Employment Peace Act are set forth in the Appendix to the Petition for a Writ of Certiorari, pp. 21-23. The pertinent provisions of the National Labor Relations Act, as amended, are set forth in the Appendix, *infra,* pp. 11-14.

STATEMENT

Gilson Brothers, hereinafter called the Company, is a Wisconsin corporation engaged in the manufacture and sale of various types of road machinery at Fredonia, Wisconsin (R. 108, 139). During 1948, the Company produced finished goods valued in excess of five hundred thousand dollars, ninety per cent of which was shipped to points outside the State of Wisconsin (R. 120). During the same period the Company purchased raw materials, equipment, and other supplies valued in

excess of three hundred and fifty thousand dollars, forty per cent of which was shipped to its Fredonia plant from outside the State of Wisconsin (*ibid.*).

The National Labor Relations Board has uniformly held that companies of comparable size and mode of operation engaged in the production and sale of road machinery are subject to the National Act. See, *e.g., Matter of Littleford Brothers,* 49 N. L. R. B. 949; *Matter of The Jaeger Machine Co.,* 74 N. L. R. B. 476; *Matter of Clearfield Machine Co.,* 78 N. L. R. B. 59, 63.

Pursuant to complaints filed by United Automobile Workers of America, A. F. of L., Region No. 9, hereinafter called the Union, alleging that the Company, in violation of Sections 111.06(1)(a), 111.06(1)(c) and 111.04 of the Wisconsin Employment Peace Act, had discriminatorily discharged three employees for the purpose of discouraging membership in the Union (R. 101-102), the Wisconsin Board conducted hearings and thereafter, on September 28, 1948, issued its Findings of Fact, Conclusions of Law and Order (R. 107-112). The Board found that the employees were discharged "solely for the reason that [they] had engaged in attempting to organize the employees of the" Company (R. 109), and ordered the Company to reinstate them with back pay (R. 110-112). The Board did not investigate the interstate character of the Company's business, and made no findings with respect thereto.

Thereafter, the Company filed with the State Board a petition for leave to adduce additional testimony (R. 114-115). At the hearing on this petition the Company offered to adduce evidence to prove, *inter alia*, that it "is engaged in interstate commerce," and that the State Board was therefore without jurisdiction (R. 115-116). The petition was denied (R. 116-117).

The State Board filed a petition for enforcement of its order in the Circuit Court of Ozaukee County (R. 117). The Company filed a "Motion to Dismiss, And in the Alternative, Motion for leave to Adduce Additional Testimony," alleging *inter alia*, that "neither the Wisconsin Employment Relations Board nor this Court has jurisdiction over the subject matter involved in these proceedings" by virtue of the effect of Sections 7, 8 (a) (1), 8 (a) (3) and 10 (a) of the National Labor Relations Act, as amended (R. 117-119). In support of the Motion the Company filed with the court an affidavit of John Gilson, president of the Company, containing the facts concerning the interstate operations of the Company (R. 120). The court assumed that it was empowered, under Section 111.07(7) of the Wisconsin Act, to grant the motion to adduce additional evidence concerning the Company's interstate transactions, but denied the motion on the ground that the proffered evidence was not material to the question of jurisdiction. The court held that under the Wisconsin decisions the State Board is not deprived of jurisdiction

over cases which the National Board is empowered to handle unless and until application is made to the National Board to handle the matter, and therefore the mere showing that the Company is subject to the National Act does not deprive the State Board of jurisdiction (R. 124-125). The court, on March 11, 1949, entered its judgment enforcing the order of the State Board (R. 129-133).

The Supreme Court of Wisconsin affirmed (R. 142). Like the Circuit Court, it assumed that the facts concerning the interstate operations of the Company were properly before the court (R. 140), but held nevertheless that the State Board had jurisdiction (R. 140-141). The court said (*ibid.*):

> At the hearing in the circuit court the company contended that the order of the board should be dismissed for the reason that the National Labor Relations Board has exclusive power to regulate the activities sought to be regulated by the state board in this proceeding as the company is engaged in interstate commerce, and for the further reason that the policy and procedure of the National Labor Relations Act differ from the policy and procedure of the Wisconsin Employment Peace Act. The same contention is made before this court.
>
> The question of jurisdiction was not raised at the hearing before the Wisconsin Employment Relations Board except that upon its petition to the board for leave to adduce additional testimony the company indicated that

as part of the additional testimony it wished to show that the employer was engaged in interstate commerce. It also contended before the circuit court, and contends here, that if the jurisdictional facts were not properly before the board and the circuit court, the company's request for leave to adduce additional evidence should have been granted.

The question of the jurisdiction of the board is not new. It has been presented many times in this court in cases arising under the provisions of the Wisconsin Employment Peace Act. In this case, the record shows that the company is a Wisconsin corporation, conducting its manufacturing operations in Wisconsin, with Wisconsin employees. There is nothing in the record to indicate that the National Labor Relations Board had ever accepted or attempted to exercise jurisdiction in a matter affecting the company or its employees, or that any petition has ever been filed requesting it to so act. Under the law as established by prior decisions of this court the Wisconsin Employment Relations Board had jurisdiction. *Wisconsin Labor R. Board* v. *Fred Rueping L. Co.,* 228 Wis. 473, 279 N. W. 673; *Allen-Bradley Local 1111* v. *Wisconsin E. R. Board,* 237 Wis. 164, 295 N. W. 791; *International B. of E. W.* v. *Wisconsin E. R. Board,* 245 Wis. 532, 15 N. W. (2d) 823; *International Union* v. *Wisconsin E. R. Board,* 250 Wis. 550, 27 N. W. (2d) 875, 28 N. W. (2d) 254; *Wisconsin E. R. Board* v. *Algoma P. & V. Co.,* 252 Wis. 549, 32 N. W. (2d) 417.

ARGUMENT

The decision of the Supreme Court of Wisconsin, issued on July 12, 1949, is clearly in conflict with the decisions of this Court in *Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U. S. 767, and *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18. The decision below reveals that the Supreme Court of Wisconsin continues to adhere to, and in this case has again applied, the same "case by case" test of federal supremacy which this Court has twice repudiated.

At the time the Supreme Court of Wisconsin decided this case the National Labor Relations Act, as amended in 1947, was already in effect.[1] Section 10 (a) of the Act, as amended, reads as follows:

> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may

[1]The amendments became effective on August 22, 1947, Section 104 of the Labor Management Relations Act, 1947.

> involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

This Court pointed out in *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 313, that the purpose of the proviso to Section 10 (a), as amended, was "to meet situations made possible by *Bethlehem Steel Corp.* v. *New York S. L. R. B.,* 330 U. S. 767, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 40; S. Rep. No. 105, Minority Views, Part 2, 80th Cong., 1st Sess. 38." By amending Section 10 (a) in this manner Congress affirmed the rule of the *Bethlehem* case that state agencies are not free to assert jurisdiction over cases subject to the jurisdiction of the National Board, whether or not a charge or petition had been filed with the National Board.[2] *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board, supra,* at 336 U. S. 18, 27. In authorizing the Board under certain circumstances to cede its jurisdiction to state agencies Congress made manifest its in-

[2] As pointed out in the *Bethlehem* case (330 U. S. at pp. 775-776), it is immaterial to this question that the provisions of the state and federal statutes are similar and that the state and federal administrative agencies might make similar determinations in the circumstances.

tention that, absent cession, the states were not to exercise jurisdiction as to matters covered by the National Act involving employers and employees who are subject to the National Act.

With respect to the specific matter involved in the case before the Court, discharge of employees for union activities, the National Act and the Wisconsin Act have "parallel provisions" (*Algoma Plywood Co.* v. *Wisconsin Employment Relations Board, supra,* at 336 U. S. 313). Compare Sections 111.04, 111.06(1)(a) and 111.06(1)(c) of the Wisconsin Act with Sections 7, 8 (a) (1) and 8 (a) (3) of the National Act. This is precisely the situation, as the Court recognized in the *Algoma* case, in which cession by the National Board must take place before the state is empowered to act. See also *LaCrosse Tel. Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18, 27.

Nor can there be any question but that the Company here involved is subject to the provisions of the National Act. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601. The National Board has consistently exercised jurisdiction over companies in the same industry, transacting interstate business of similar magnitude (*supra,* p. 3). Indeed, the Supreme Court of Wisconsin itself assumed that the operations of the Company brought it within the purview of the National Act (*supra,* pp. 5-6).

The National Board has not ceded to the Wiscon-

sin Board any jurisdiction over this type of case or over the employer here involved. Absent cession, we think it clear that the exercise of jurisdiction by the Wisconsin Board and courts in this case is in conflict with the National Act.

CONCLUSION

The question herein presented is of substantial importance in the administration of the Act. For the reasons set forth above, we believe that the decision of the court below is in conflict with controlling decisions of this Court and should be reversed. The Solicitor General, on behalf of the Board, therefore respectfully urges that the petition for a writ of certiorari be granted. If the writ is granted and oral argument scheduled, the Board respectfully prays leave to participate therein.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

NOVEMBER 1949.

APPENDIX

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—

* * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the

appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry

(other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 051781 391